



**QUEEN'S
UNIVERSITY
BELFAST**

Refugees and Human Rights: The Future of International Protection in the UK

Harvey, C. (2015). Refugees and Human Rights: The Future of International Protection in the UK. *European Human Rights Law Review*, 595-603.

Published in:
European Human Rights Law Review

Document Version:
Peer reviewed version

Queen's University Belfast - Research Portal:
[Link to publication record in Queen's University Belfast Research Portal](#)

Publisher rights

© 2015 The Author

This is a pre-copyedited, author-produced version of an article accepted for publication in *European Human Rights Law Review* following peer review. The definitive published version is available online on Westlaw UK or from Thomson Reuters DocDel service"

This is an open access Creative Commons Attribution-NonCommercial License (<https://creativecommons.org/licenses/by-nc/4.0/>), which permits use, distribution and reproduction for non-commercial purposes, provided the author and source are cited.

General rights

Copyright for the publications made accessible via the Queen's University Belfast Research Portal is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The Research Portal is Queen's institutional repository that provides access to Queen's research output. Every effort has been made to ensure that content in the Research Portal does not infringe any person's rights, or applicable UK laws. If you discover content in the Research Portal that you believe breaches copyright or violates any law, please contact openaccess@qub.ac.uk.

Refugees and Human Rights: The Future of International Protection in the UK

Colin Harvey*
Queen's University Belfast

Abstract

The global refugee crisis is raising profound questions for the future of international protection. This article, based on a talk given as part of Refugee Week 2015, offers reflections on the current debate. The need to internationalise the conversation is underlined. Although no one state can resolve the problems of the world, it is precisely in the response to the plight of the forcibly displaced that commitments to human rights and refugee protection are tested in practical terms. This article argues that the UK's approach remains inadequate and problematic.

Refugees and Human Rights in Global Perspective

Any assessment of *refugees and human rights* must start by reflecting on the scale of the global displacement crisis. UNHCR's latest *Global Trends* report notes that at the end of 2014 the number of those forcibly displaced by persecution, conflict, generalised violence and human rights violations (refugees, internally displaced persons and asylum seekers) stood at 59.5m: 19.5m refugees, 38.2m internally displaced persons, and 1.8m asylum seekers.¹ The top host countries in 2014 were: Turkey, Pakistan, Lebanon, Iran, Ethiopia and Jordan,² with developing regions taking responsibility for 86% of the world's refugees.³ To put this in perspective, at the time of writing there are over 4m Syrian refugees who have sought protection in neighbouring countries, with over 1m registered Syrian refugees in Lebanon – more than 20% of the population of the country.⁴ Only a small percentage (less than 10%) of those displaced by the conflict have sought asylum in Europe.⁵ While this is not to understate the problems faced by European states (there were significant increases in forced displacement in Europe in 2014 and 2015), it does place matters in context. All the more important then,

* School of Law, Queen's University Belfast. This an edited version of a lecture delivered on 19 June 2015 for Refugee Week at the Law Centre (NI) in Belfast, and organised by the Northern Ireland Community of Refugees and Asylum seekers (NICRAS) and Law Centre (NI).

¹ UNHCR, *Global Trends: Forced Displacement in 2014* (Geneva: UNHCR, 2015) p. 2

² Ibid.

³ UNHCR, *Global Trends: Forced Displacement in 2014* (Geneva: UNHCR, 2015) p. 2

⁴ See http://data.unhcr.org/syrianrefugees/regional.php#_ga=1.45888228.1915356930.1422882787 (accessed 7 October 2015).

⁵ Ibid. See also, Eurostat, *Asylum in the EU*, 18 September 2015, <http://ec.europa.eu/eurostat/documents/2995521/6996925/3-18092015-BP-EN.pdf/b0377f79-f06d-4263-aa5b-cc9b4f6a838f> (accessed 7 October 2015).

and despite the disagreements, that EU Member States establish ways to make the concept of solidarity a meaningful one.⁶

In order to advance consideration of the issues this article concentrates on four themes: first, the interaction between international refugee and human rights law; second, the European context; third, the right to seek asylum in the UK; and finally, thought is given to ways forward and what the future might hold for refugee law. The intention is to raise further questions about prospects for international protection from a human rights perspective but also to indicate plainly that the UK's response is part of a concerted attempt to move away from the idea of a right to seek asylum towards a more selective and restrictive approach. This maps securely on to a more generalised trend and one that is steadily promoting suspicion of many forms of free movement.

Internationalising the Debate

First, it is worth considering the state of international refugee and human rights law; it remains vital to locate the discussion in its international legal setting. This may not seem obvious when the practical needs are so pressing and urgent, but there is a strong case for insisting on the applicability of international norms to any current and future discussion.

The treatment of refugees and asylum seekers is governed by what happens in states and regions, and should be guided by the standards of international law. Reference to international refugee law here effectively means the 1951 Convention relating to the Status of Refugees⁷ and the 1967 Protocol relating to the Status of Refugees (the instrument that removed the temporal restriction, and the geographical limitation for most).⁸ The Conference that drafted the 1951 Convention met in Geneva from 2 – 25 July 1951, and the UK was one of the 26 states represented, and an active participant.⁹ There are currently 145 States parties

⁶ See Article 80, Treaty on the Functioning of the European Union, OJ C326/47, 26 October 2012; European Commission, *A European Agenda for Migration*, COM (2015) 240 final, 13 May 2015; *European Commission Statement following the decision at the Extraordinary Justice and Home Affairs Council to relocate 120,000 refugees*, http://europa.eu/rapid/press-release_STATEMENT-15-5697_en.htm (accessed 7 October 2015); and Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L239/146. See also, European Commission, *On enhanced intra-EU solidarity in the field of asylum – An Agenda for better responsibility sharing and more mutual trust*, COM (2011) 835 final, 2 December 2011.

⁷ 189 UNTS 150, entry into force 22 April 1954.

⁸ 606 UNTS 267, entry into force 4 October 1967.

⁹ See UNHCR, *1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Travaux préparatoires)*, <http://www.unhcr.org/cgi-bin/texis/vtx/search/?page=&comid=3c07a8642&cid=49aea9390&scid=49aea9398> (accessed 7 October 2015). See also, Andreas Zimmermann (ed.) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011).

to the 1951 Convention, and 146 States parties to the 1967 Protocol.¹⁰ The UK signed the Convention on 28 July 1951, and ratified it on 11 March 1954 (taking the more inclusive option of “events occurring in Europe or elsewhere before 1 January 1951”).¹¹ The UK acceded to the 1967 Protocol on 4 September 1968.¹² It is worth noting at this point that many of the largest refugee-hosting states are not party to either the 1951 Convention or 1967 Protocol, for example, Jordan and Lebanon, and also see the situation on ratifications in general in the Middle East, South Asia and South East Asia.¹³

The Statute of the Office of UNHCR must also be highlighted (UNHCR has offices in London and Dublin).¹⁴ The international community places a weighty responsibility on UNHCR, and its practical mandate has continually expanded.¹⁵ While unwilling to extend the international legal definition, states – through the UN – are prepared to expand the remit of UNHCR.

International refugee law arose from the post-1945 phase of human rights standard setting,¹⁶ and the Universal Declaration of Human Rights 1948 (UDHR), Article 14, provides for “the right to seek and to enjoy in other countries asylum from persecution”.¹⁷ The Preamble to the 1951 Convention refers to the UDHR, and “the principle that human beings shall enjoy fundamental rights and freedoms without discrimination”. What international refugee law does, however, is offer an international legal understanding of “refugee” with listed guarantees.¹⁸ It is a “status-creating” international legal regime; a status that is declared rather than constituted by state recognition.¹⁹

The creation of a status - “refugee” - and substantive guarantees does not, however, come with procedural obligations on status determination. This is primarily delegated to states. The 1951 Convention and 1967 Protocol are effectively silent on refugee status determination procedures. There is no independent treaty-monitoring body for refugee law; as there is for

¹⁰ <https://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&lang=en> (accessed 7 October 2015).

¹¹ https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en (accessed 16 June 2015).

¹² https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en (accessed 16 June 2015).

¹³ <https://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&lang=en> (accessed 7 October 2015)

¹⁴ UNGA Resolution 428 (V), 14 December 1950, Annex.

¹⁵ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed. Oxford: OUP, 2007) pp. 2–35.

¹⁶ See James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: CUP, 2005) pp. 75–153; Alice Edwards, “International Refugee Law” in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), *International Human Rights Law* (2nd ed, Oxford: OUP, 2014) pp. 513–527.

¹⁷ Article 14(1).

¹⁸ James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd ed. Cambridge: CUP, 2014).

¹⁹ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (revised ed. 2011) <http://www.unhcr.org/3d58e13b4.html> (accessed 7 October 2015).

many international human rights instruments.²⁰ UNHCR plays a crucial supervisory role, and States parties to the 1951 Convention and 1967 Protocol agree to co-operate with UNHCR, and are required to “facilitate its duty of supervising” the Convention or Protocol.²¹ Refugee status determination is mainly but not exclusively (UNHCR also does status determination²²) left to states.

What are the key elements of this status? There must be a well-founded fear of being persecuted for a “Convention reason” (race, religion, nationality, membership of a particular social group and political opinion).²³ She must be outside her country of nationality or habitual residence and be unwilling or unable to avail of state protection.²⁴ The exclusion clauses of refugee law are intended to ensure that it does not apply if there are “serious reasons for considering” she has, for example, “committed a crime against peace, a war crime, or a crime against humanity” or “has been guilty of acts contrary to the purposes and principles of the United Nations”.²⁵ UNHCR²⁶ and others²⁷ have provided helpful guidance, and the EU has developed its own “common understanding” of core elements; but again given the nature of the international regime definitional decision-making takes place routinely at national level.

This declaratory international legal status brings with it guarantees. These include fundamental protections, such as *non-refoulement*, as well as a range of civil, political, social, economic, and cultural rights.²⁸ While these are carefully delimited in refugee law they do offer the potential basis - if effectively implemented - for relative security for refugees. This legal form of international protection persists until effective protection has been secured either voluntarily (in the host state or country of origin) or through a fundamental change of circumstances (in the country of origin).

International refugee law is therefore a carefully designed, and still fragile, status-creating mechanism that represents a compromise between the humanitarian reality of global

²⁰ On this, see generally, Katie O’Byrne, “Is there a *Need* for Better Supervision of the Refugee Convention?” (2013) 26 *Journal of Refugee Studies* 330; Joanna Whiteman and Claire Nielsen, “Lessons from Supervisory Mechanisms in International and Regional Law” (2013) 26 *Journal of Refugee Studies* 360.

²¹ Article 35 (1) 1951 Convention, and Article II 1967 Protocol.

²² Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed. Oxford: OUP, 2007) p. 53; Michael Kagan, “The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination” (2006) 18 *International Journal of Refugee Law* 1-29.

²³ Article 1A(2).

²⁴ Article 1A(2).

²⁵ Article 1F.

²⁶ See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (revised ed. 2011) <http://www.unhcr.org/3d58e13b4.html> (accessed 7 October 2015).

²⁷ For example, James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd ed. Cambridge: CUP, 2014).

²⁸ Articles 2-34. See James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: CUP, 2005).

forced displacement and the fact of a state-based international system (states that still view migration control, in all its forms, as intrinsic to their understanding of self-determination). The 1951 Convention and 1967 Protocol are now supplemented by international human rights law in significant ways. To such an extent, in fact, that the relevancy of international refugee law is questioned.²⁹ The international human rights instruments primarily apply to “everyone”; the status that matters is: *human being*.

The UK has ratified a significant number of international human rights treaties (although it is less keen to sign up to the complaints mechanisms).³⁰ The UN Human Rights Committee in its communications, concluding observations and general comments underlines the relevance of the International Covenant on Civil and Political Rights 1966 (ICCPR) to refugees and asylum seekers.³¹ Although the UK has ratified the ICCPR it has not ratified the Optional Protocol (that would allow complaints to be taken to the Committee).³² The Committee has, for example, dealt with questions of *refoulement* and detention practices (it has been explicitly critical of the UK’s approach to detention in its concluding observations³³). The UN Committee against Torture, its sub-committee on prevention, and the national preventive mechanisms, have a significant role in relation to, for example, *non-refoulement* and detention conditions.³⁴ The Committee against Torture has established a substantial “jurisprudence” on *non-refoulement*,³⁵ and it is notable, for example, that Article 16 of the International Convention for the Protection of all Persons from Enforced Disappearance 2006 prohibits *refoulement* in the context of enforced disappearance.³⁶ Useful work has been done by the UN Committee on the Rights of the Child (on, for example, unaccompanied and separated asylum

²⁹ See Vincent Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law” in Ruth Rubio-Marín, *Human Rights and Immigration* (Oxford, Oxford University Press, 2014) pp. 19-72; Colin Harvey, “Time for Reform? Refugees, Asylum-seekers and Protection Under International Human Rights Law” (2015) 34 *Refugee Survey Quarterly* 43-60.

³⁰ See <http://indicators.ohchr.org/> (accessed 9 October 2015).

³¹ 999 UNTS 171, 168 States parties,

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed 7 October 2015).

³² https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (accessed 7 October 2015)

³³ See, Concluding Observations of the Human Rights Committee, CCPR/C/GBR/CO/6 30 July 2008, para 21.

³⁴ This is evident in, for example, the concluding observations in 2013 on the last UK State report: CAT/C/GBR/CO/5, 24 June 2013, paras 18, 20, 30.

³⁵ Fernando M. Mariño Menéndez, “Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugees” (2015) 34 *Refugee Survey Quarterly* 61-78

³⁶ 2716 UNTS 3, 50 States parties

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en (accessed 7 October 2015).

seeking children³⁷) and the Committee on the Elimination of Discrimination against Women (CEDAW). There is continuing work on the use of the Convention on the Rights of Persons with Disabilities 2006 (the UK has ratified the Convention, and the Optional Protocol – a point worth considering given the treatment of refugees and asylum seekers with disabilities).³⁸ On CEDAW, see for example, its recent General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality, and the statelessness of women.³⁹ The UN Committee on Economic, Social and Cultural Rights, in its concluding observations, has been critical of the UK's approach to access to the labour market for asylum seekers.⁴⁰

It is too easy to overstate the significance of international refugee and human rights law. The limits of these international mechanisms are well known.⁴¹ However, if the UK's treatment of refugee and asylum seekers is to be assessed it remains useful to have an internationalised normative environment within which to frame it, assess legal and policy developments, as well as argue for reform. As weak as it seems at times, it is essential that the debate is continually internationalised and creative use made of the standards that do exist.

Human Rights and Solidarity in Europe

What can be said about the European context? The appalling events of 2015 are well-documented, as those forced to flee continue to make the risky journey to Europe.⁴² These are human tragedies founded on global injustice that require an urgent human rights based response.⁴³ The situation is not new for the forcibly displaced attempting to enter Europe or when viewed in global perspective. Recall the interdiction of Haitian asylum seekers at sea in the 1980s, those who fled Vietnam by boat in the 1970s, the “Pacific solution” approach of the

³⁷ UNCRRC, General comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005 <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf> (accessed 7 October 2015). See Jane McAdam, “Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection” (2006) 14 *International Journal of Children's Rights* 251-274.

³⁸ 2515 UNTS 3, 159 States parties, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en (accessed 7 October 2015).

³⁹ CEDAW/C/GC/32, 14 November 2014.

⁴⁰ See E/C.12/GBR/CO/5, 12 June 2009.

⁴¹ See Oona Hathaway, “Do Human Rights Treaties Make a Difference?” (2002) 111 *Yale Law Journal* 1935. Cf. Beth A. Simmons, *Mobilizing for Human Rights: International in Domestic Politics* (Cambridge: CUP, 2009); Colin Harvey “Reconstructing and Restoring Human Rights” in Theo Gavrielides (ed.), *Rights and Restoration within Youth Justice* (Whitby: de Sitter Publications, 2012) 67-89.

⁴² See UNHCR, *The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees*, 1 July 2015, <http://www.unhcr.org/5592bd059.html> (accessed 7 October 2015).

⁴³ Amnesty International, *The Global Refugee Crisis: A Conspiracy of Neglect* (London: AI, 2015).

Australian government, as well as the response of governments in Thailand, Malaysia, and Indonesia to those arriving by boat.⁴⁴

There are two European contexts to note here: first, the ambitions of the EU, and then the European Convention on Human Rights as a regional human rights instrument. The EU has established a Common European Asylum System (CEAS), and there is now an elaborate framework of Treaty provisions, Regulations and Directives.⁴⁵ The CJEU has a role in shaping asylum law; and it has made significant rulings on the meaning of European law in this area.⁴⁶ The Charter of Fundamental Rights of the EU contains a right to asylum,⁴⁷ and protection against removal, expulsion or extradition.⁴⁸ Protocol 21 provides for an “opt-in” procedure⁴⁹ (for the UK and Ireland) – the UK opted in to phase one of the development of the CEAS, but has not done so for the recast versions of the Qualification Directive, Reception Conditions Directive, and the Procedures Directive.⁵⁰

Multiple failings in this EU project continue to be highlighted, including the many problems experienced with the Dublin system, and the continuing challenges to it.⁵¹ The

⁴⁴ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed. Oxford: OUP, 2007) pp. 270-284.

⁴⁵ See Helen O’Nions, *Asylum – A Rights Denied: A Critical Analysis of European Asylum Policy* (Farnham: Ashgate Publishing, 2014); UNHCR, *The CEAS at a crossroads: Consolidation and implementation at a time of new challenges – UNHCR recommendations to Latvia for the EU Presidency January – June 2015* (Brussels: UNHCR, 2015); Guy Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge: CUP, 2010); Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (Cambridge: CUP, 2013); Hélène Lambert, “Transnational Judicial Dialogue, Harmonization and the Common European Asylum System” (2009) 58 *International and Comparative Law Quarterly* 519-543.

⁴⁶ See, for example, *A, B, C v Staatssecretaris van Veiligheid en Justitie*, Judgment of Court (Grand Chamber) 2 December 2014, Joined Cases C-148/13 – C150/13; *X, Y, and Z v Minister voor Immigratie en Asiel* (Joined Cases C-199/12, C-200/12, C-201-12, 7 November 2013); *N.S. v Secretary of State for the Home Department and M.E. and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, (Joined Cases, C-411/10, C-493/10, 21 December 2011). See also, Hélène Lambert, “The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence” (2013) 25 *International Journal of Refugee Law* 207; Ledi Bianku, “Roundtable Discussion with the IARLJ, the CJEU, and the ECtHR on Leading Asylum Cases” (2013) 25 *International Journal of Refugee Law* 382; Cathryn Costello, “Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored” (2012) 12 *Human Rights Law Review* 287-339; Laurens Hueting and Livio Zilli, “The judgment of the Court of Justice of the European Union in *X, Y and Z v Minister voor Immigratie en Asiel*: a glass half full for ‘rainbow refugees’” [2014] *European Human Rights Law Review* 490.

⁴⁷ Article 18.

⁴⁸ Article 19.

⁴⁹ Home Office and Ministry of Justice, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/466238/jha-opt-in-background.pdf, 7 October 2015 (accessed 7 October 2015).

⁵⁰ See Cathryn Costello, *The UK, the Common European Asylum System and EU Immigration Law*, <http://migrationobservatory.ox.ac.uk/policy-primers/uk-common-european-asylum-system-and-eu-immigration-law> (accessed 7 October 2015).

⁵¹ See Susan Fratzke, *Not Adding Up: The Fading Promise of Europe’s Dublin System* (Brussels: Migration Policy Institute, March 2015); Parliamentary Assembly of the Council of Europe, Resolution 2072 (2015) 29 September 2015, *After Dublin – the urgent need for a real European asylum system*.

absence of effective European solidarity and lack of basic trust between Member States, evident in the current response to the global crisis of forced displacement, places the future of this project in doubt. The functioning of asylum systems across Europe raises questions for international refugee and human rights law, but also highlights basic matters of compliance with EU law, and adherence to the EU's own human rights obligations under the Charter of Fundamental Rights. The failures that are now acutely evident relate tellingly to the EU's own "self-understanding".

Another context to note is the role of the European Court of Human Rights. The Court is under considerable pressure and strain – and the critical debates in the UK are well known.⁵² Despite this, the Court is in fact fairly constrained, and even conservative, in its approach to Convention rights – at times it could go much further. It has established sensible human rights principles and underlined repeatedly that the Convention applies to everyone within the jurisdiction of the state. In *Hirsi Jamaa*,⁵³ for example, reminding states of their obligations even when they have concluded bi-lateral agreements with other states. It continues to insist that, for example, Articles 2 and 3 apply equally to deportation, removal, expulsion and extradition, in case after case the Court focuses on whether there are substantial grounds to believe that there is a real risk (the risk need not be for a particular "Convention reason", and the behaviour of the individual is not a material factor – the *Chahal*⁵⁴ point that exercises the UK government so much). The Court (respectful of subsidiarity and its own workload) stresses the need for effective remedies at the national level; and in cases such as *MSS v Belgium and Greece*⁵⁵ and *Tarakhel v Switzerland*⁵⁶ reminds states of their human rights obligations even in the context of other collective mechanisms.

The challenges involved in using the Strasbourg system are well known, and should be acknowledged (the vast bulk of cases decided are held to be inadmissible or are struck out⁵⁷),

⁵² See Colm O'Cinneide, *Human Rights and the UK Constitution* (London: British Academy Policy Centre, 2012) <http://www.britac.ac.uk/policy/Human-rights.cfm>; Richard Clayton, "Smoke and Mirrors: The Human Rights Act and the Impact of the Strasbourg Case Law" [2012] *Public Law* 639.

⁵³ *Hirsi Jamaa and others v Italy*, Appl. No. 27765/09 (23 February 2012) GC.

⁵⁴ *Chahal v UK*, Application No. 22414/93 (15 November 1996) GC.

⁵⁵ *MSS v Belgium and Greece*, Appl. No. 30696/09, (21 January 2011) GC. For analysis, Violeta Morena-Lax, "Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*" (2012) 14 *European Journal of Migration and Law* 1-31.

⁵⁶ *Tarakhel v Switzerland*, Appl. No. 29217/12 (4 November 2014) GC.

⁵⁷ European Court of Human Rights, Statistics, 1/1-31/8/2015, http://www.echr.coe.int/Documents/Stats_month_2015_ENG.pdf (accessed 7 October 2015)

and there is disappointing case law too. Examples of this include *JK and others*⁵⁸ - a Chamber judgment on the safety of return to Iraq - and perhaps most clearly the “health care” cases.⁵⁹

The popular commentary around its jurisprudence clouds the development of often quite unsurprising human rights principles based on a reasonable and fair reading of Convention rights. The idea of a strong regional human rights court is worth defending, and while dialogue between judges in the UK and Strasbourg is welcome (and happening) it is equally necessary to ensure that the Court holds to a rights-reinforcing jurisprudence.

The End of the Right to Seek Asylum in the UK?

The aim so far has been to set the global and European scene. It is time to reflect on the state of the human right to seek asylum in the UK. The first thing to note is just how complex and elaborate immigration and asylum law and policy now is.⁶⁰ The system itself is a relatively, and historically speaking, recent development of the last 20 years.

Although this conversation should not be reduced to statistics, the falls in the overall numbers of those seeking asylum in the UK is instructive. There were 84,132 asylum applications in 2002, reducing to 23,507 applications in 2013 (88% in-country) and 24,194 applications in 2014 (90% in-country).⁶¹ When reflecting on this keep in mind that global figure from earlier. In terms of numbers, the UK was 5th in the EU (after Germany, Sweden, France, and Italy) and 16th in terms of relative size of population.⁶² The main countries of origin in 2014 were: Eritrea, Pakistan, Syria, and Iran.⁶³ There is a UK resettlement programme, and it does make a contribution to UNHCR efforts: there were 787 persons resettled in 2014.⁶⁴ The UK resettled 143 people under the Syrian Vulnerable Persons Relocation Scheme in 2014, and has now committed to a figure of 20,000 over the period of this Parliament.⁶⁵

⁵⁸ *JK and others v Sweden*, Appl. No. 59166/12, 4 June 2015.

⁵⁹ See comments in the dissenting opinion in *SJ v Belgium*, Appl. No. 70055/10, 19 March 2015 GC and also the case of *MT v Sweden*, Appl. No. 1412/12, 26 February 2015.

⁶⁰ See Gina Clayton, *Textbook on Immigration and Asylum Law*, (6th ed, Oxford: OUP, 2014).

⁶¹ Home Office, Immigration Statistics, Quarterly Release, <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> (9 October 2015).

⁶² Home Office, Immigration Statistics, Quarterly Release, <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> (9 October 2015).

⁶³ Home Office, Immigration Statistics, Quarterly Release, <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> (9 October 2015).

⁶⁴ Home Office, Immigration Statistics, Quarterly Release, <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> (9 October 2015).

⁶⁵ Home Office, Immigration Statistics, Quarterly Release, <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> (9 October 2015) and “Syrian Refugees: what you can do to help” <https://www.gov.uk/government/news/syria-refugees-what-you-can-do-to-help--2>, 16 September 2015 (accessed 7 October 2015).

The UK has achieved quite a significant drop in applications since 2002. This is not accidental. The policy of successive governments has been driven by principles of deterrence, deflection and restriction. It is simply very difficult to arrive in the UK lawfully to claim asylum, and there is evidence that individuals have been inappropriately and wrongly “penalised” for doing so (even though there are quite clear protections in place).⁶⁶ In thinking about how the UK got those applications down, just reflect on the combination of visa rules, entry clearance, carriers’ liability, criminal sanctions, detention, and the operation of the Dublin system.⁶⁷ It is not an easy matter to make it to the UK to exercise the right to seek asylum, and this will become even more challenging in the future.⁶⁸

Once an asylum claim is made, the applicant is then potentially subject to the reception and support arrangements in place for destitute asylum seekers, during the asylum process and subsequent appeal (there is a ‘destitution test’ to underline the point). This includes initial reception, dispersal, limited subsistence support (around 50% single person and 60% couple of mainstream welfare benefits), and the provision of accommodation on a no choice basis. At the end of 2014, over 29,000 asylum seekers and their dependants were receiving section 95 support – with this figure at over 30,000 in the first quarter of 2015.⁶⁹ 492 people were receiving section 95 support in Northern Ireland at the end of March 2015.⁷⁰

The restrictions on the right to work should be kept in mind; as a general rule asylum seekers are not permitted to work. Note also, the flawed and problematic nature of the system of section 4 support for refused asylum seekers, and the stark plight of those who do not qualify for support.⁷¹ And remember the detention powers that are available, and the position of those who are detained in Immigration Removal Centres. It is a law and policy framework that

⁶⁶ Gina Clayton, *Textbook on Immigration and Asylum Law*, (6th ed, Oxford: OUP, 2014) pp. 393-396.

⁶⁷ Many of these “deflection” measures are part of wider trends, see Tilman Rodenhäuser, “Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control” (2014) 26 *International Journal of Refugee Law* 223-247; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Oxford: Hart Publishing, 2012); Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: CUP, 2011).

⁶⁸ “Theresa May pledges asylum reform and immigration crackdown”, <http://www.bbc.co.uk/news/uk-politics-34450887> (accessed 6 October 2015).

⁶⁹ Home Office, Immigration Statistics, Quarterly Release, <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> (9 October 2015); Refugee Council, Asylum Support (May 2015): https://www.refugeecouncil.org.uk/policy_research/policy_work (last accessed 19 June 2015).

⁷⁰ Refugee Council, Asylum Support (May 2015): https://www.refugeecouncil.org.uk/policy_research/policy_work (last accessed 19 June 2015). For Northern Ireland, see Law Centre NI, *How many asylum seekers and refugees are there in Northern Ireland*, <http://www.lawcentreni.org/Publications/Policy-Briefings/How-many-refugees-in-NI-Oct-2015.pdf> (accessed 7 October 2015).

⁷¹ See the provisions of the Immigration Bill 2015 with proposals for further limits to support, <http://services.parliament.uk/bills/2015-16/immigration.html> (accessed 10 October 2015).

deliberately engineers poverty and destitution for many who are already traumatised by flight from persecution, conflict and human rights violations; it is deprivation of human rights by design. It is not hard to guess what message it is intended to send.

The assessment of the asylum claim, the delays in the process, mistakes, the interview itself (including getting to it) all are continuing causes of concern. Despite extended efforts at improving the quality over many years, the asylum interview remains a problem. Is it noteworthy that of the 8,200 appeals in 2014 28% were allowed?⁷² And do not forget, this is often not about a radical new agenda, but simply ensuring the principles that guide this area of policy operate fairly and coherently. For further evidence of the problems it is worth reading the Home Affairs Committee Report from October 2013 on the scale of the difficulties afflicting the system.⁷³ Little of this is new and the flaws have a long history.

If an individual does manage to make an asylum claim in the UK, recognition rates are improving. For example, in 2014, 41% of the decisions made resulted in some form of leave – most refugee status (36%) (these figures include: refugee status, humanitarian protection, discretionary leave, family life and private life rules, leave outside the rules, and leave for unaccompanied asylum seeking children).⁷⁴

Even if refugee status or humanitarian protection is granted difficulties persist, for example on the application of the rules on termination of support, on family reunification, and on the uncertainty that can arise for families as a result of the rules on leave to remain – as well as the many other obstacles that face recognised refugees in the UK. An effective Refugee Integration Strategy can, for example, help to ensure a joined up approach – such a strategy is long overdue in Northern Ireland.⁷⁵

Time and again across the last 20 years of refugee and asylum law and policy in the UK, courts and judges at all levels have had to remind successive governments of the basics of

⁷² Home Office, Immigration Statistics, Quarterly Release, <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> (9 October 2015).

⁷³ Home Affairs Committee, *Asylum*, Seventh Report of 2013-14, HC 71, 11 October 2013.

⁷⁴ Home Office, Immigration Statistics, Quarterly Release, <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> (9 October 2015); Refugee Council Annual Asylum Trends (12 March 2015), https://www.refugeecouncil.org.uk/policy_research/policy_work (last accessed 19 June 2015).

⁷⁵ On the position in Northern Ireland see Lindsay Ferguson, “New figures reveal 500 people seeking asylum in Northern Ireland” <http://www.thedetail.tv/articles/500-seeking-asylum-in-northern-ireland> (accessed 7 October 2015); Michael Potter, “Refugees and Asylum seekers in Northern Ireland” Northern Ireland Assembly, Research and Information Service Research Paper, NIAR 348-14, 6 June 2014; Charlotte-Anne Malischewski, “Integration in a Divided Society” RSC Oxford Working Paper Series No. 91 (April 2013); Northern Ireland Strategic Migration Partnership, “A Proposal for an Integration Strategy for Northern Ireland” (November 2013), <http://www.migrationni.org/DataEditorUploads/Refugee%20Integration%20Strategy%20Proposal%20Final%20draft.pdf> (accessed 7 October 2015).

the rule of law, and the minimum standards required by the principle of legality.⁷⁶ It was not so long ago that one government attempted (unsuccessfully) to oust judicial review altogether⁷⁷ and there have been highly directed criticism of individual judges in the past, and many attempts to render challenge mechanisms practically ineffective or inaccessible. The right of access to justice, and effective access to accountability mechanisms, are particularly important for refugees and asylum seekers.

There are “the risks of getting it wrong”⁷⁸ - and what that could ultimately mean - combined with a history of poor initial decision making, and mistake after mistake in an administrative system under immense strain that should remind us why the right of access to justice matters so much. It is essential then that the principle of legality – the simple idea that the rule of law applies fairly and consistently to everyone – is not just a meaningless and abstract label. It is also essential that the Human Rights Act 1998, that has been so helpful in ensuring that the basic rights of everyone are protected, is defended.

The Future?

Finally then, what about the future? The story of the last two decades in the UK is easily told. A substantial and complex body of law, policy, guidance, and practice has emerged. There is a distinctive administrative structure. This exists in the global and regional contexts noted. It is a harsh and at times cruel system that makes it difficult to reach the UK to seek asylum in the first place, and renders life extremely challenging for those subject to it (including those recognised as refugees or with humanitarian protection or other leave). Let there be little doubt. This intended and designed cruelty runs parallel with basic administrative and other problems. It is “intended” in the sense that it is part of campaign to promote mistrust of the concept of freedom of movement (for some but not all), and an approach that will empty the notion of a right to seek asylum of content.

Whatever the profound flaws of existing refugee and asylum law in the UK one major challenge is simply ensuring that the positive aspects are properly, consistently, fairly and humanely applied in practice. Judges, lawyers, all of us must insist that the rule of law, human rights, and the principle of legality apply equally to refugees and asylum seekers.

⁷⁶ For example, *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840. See generally, Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (London: Sweet and Maxwell, 2004) pp. 315-365.

⁷⁷ See Richard Rawlings, “Review, Revenge and Retreat” (2005) 68 *Modern Law Review* 378-410.

⁷⁸ The point was made in the 1990s by the Asylum Rights Campaign in “The Risks of Getting it Wrong”: The Asylum and Immigration Bill Session 1996 and the Determinations of Special Adjudicators” (London: Asylum Rights Campaign 1996).

Perhaps this is best viewed as part of a global human rights crisis in this sense: people are forced to flee their homes for reasons that include armed conflict, persecution, serious human rights violations, generalised violence, climate change, and extreme poverty. If the existing standards of international human rights law were effectively implemented and consistently enforced the picture would be radically different. Hard questions must also be asked about the effectiveness of the global human rights regime. Just look at the states that account for a large number of asylum applications in the UK today: Eritrea, Sudan, Syria, and Iraq. This connects us all directly to the global human rights movement, and the need to retain a sharp focus on the reasons why people are forced to flee in the first place. In that respect, we still need a new global human rights revolution.

To end then, we must work together to ensure that the right to seek asylum, the principle of international protection, and the human rights of all refugees and asylum seekers are securely safeguarded in the UK. The current UK government is continuing to fail in its global and regional responsibilities towards refugees and asylum seekers. The global crisis of forced displacement deserves a better and more humane response.